

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSE BAUTISTA,
Petitioner,

V.

MARION SPEARMAN, Warden,
Respondent.

Case No. 16-cv-03174 NC

ORDER OF SERVICE

Petitioner Jose Bautista, a state prisoner incarcerated at High Desert State Prison, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

I. BACKGROUND

Petitioner was convicted by a jury of robbery with a firearm enhancement in the Santa Clara County Superior Court of the State of California. On May 23, 2013, he was sentenced to two years for robbery and a consecutive 20 years for a firearm enhancement in state prison. Petitioner unsuccessfully appealed his conviction to the California Court of Appeal and the Supreme Court of California, which on June 10, 2015, denied review of a petition allegedly raising the same claims raised here.

II. DISCUSSION

A. Legal Standard

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

1 custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
2 § 2254(a). It shall “award the writ or issue an order directing the respondent to show cause
3 why the writ should not be granted, unless it appears from the application that the applicant
4 or person detained is not entitled thereto.” 28 U.S.C. § 2243. Summary dismissal is
5 appropriate only where the allegations in the petition are vague or conclusory, palpably
6 incredible, or patently frivolous or false. *See Hendricks v. Vasquez*, 908 F.2d 490, 491
7 (9th Cir. 1990).

8 **B. Petitioner’s Legal Claims**

9 Petitioner seeks federal habeas corpus relief by raising the following claim:
10 ineffective assistance of counsel at the sentencing phase. Liberally construed, the claims
11 appear colorable under 28 U.S.C. § 2254 and merit an answer from respondent.

12 **III. CONCLUSION**

13 For the foregoing reasons and for good cause shown:

- 14 1. The clerk shall serve by certified mail a copy of this order and the
15 petition and all attachments thereto upon respondent. The clerk shall also
16 serve a copy of this order on petitioner.
- 17 2. Respondent shall file with the court and serve on petitioner, within 60
18 days of the date of this order, an answer showing why a writ of habeas
19 corpus should not be issued (or -an answer conforming in all respects to
20 Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a
21 writ of habeas corpus should not be issued). Respondent shall file with
22 the answer and serve on petitioner a copy of all portions of the
23 administrative record that are relevant to a determination of the issues
24 presented by the petition.
- 25 3. If the petitioner wishes to respond to the answer, he shall do so by filing a
26 traverse with the court and serving it on respondent within 30 days of his
27 receipt of the answer.

4. Respondent shall file a consent or declination to magistrate judge jurisdiction within 14 days.

IT IS SO ORDERED.

Dated: September 2, 2016

NATHANAEL M. COUSINS
United States Magistrate Judge

United States District Court
Northern District of California

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**CONSENT OR DECLINATION TO
MAGISTRATE JUDGE
JURISDICTION**

INSTRUCTIONS: Please indicate below by checking one of the two boxes whether you (if you are the party) or the party you represent (if you are an attorney in the case) choose(s) to consent or decline magistrate judge jurisdiction in this matter. Sign this form below your selection.

() Consent to Magistrate Judge Jurisdiction

In accordance with the provisions of 28 U.S.C. § 636(c), I voluntarily consent to have a United States magistrate judge conduct all further proceedings in this case, including trial and entry of final judgment. I understand that appeal from the judgment shall be taken directly to the United States Court of Appeals for the Ninth Circuit.

OR

() Decline Magistrate Judge Jurisdiction

In accordance with the provisions of 28 U.S.C. § 636(c), I decline to have a United States magistrate judge conduct all further proceedings in this case and I hereby request that this case be reassigned to a United States district judge.

DATE:

NAME:
COUNSEL FOR:
(OR "PRO SE:")

Signature